

**QUESTIONS FROM SUBCOMMITTEE CHAIR LINDA SÁNCHEZ
FOR JOHN McKAY**

1. Several press reports quoting you have referred to a meeting you had with White House Counsel Harriet Miers and her deputy in 2006 concerning your interest in being nominated to be a federal judge in Washington, and to complaints from Republicans concerning the 2004 Washington gubernatorial election that were discussed at the meeting. Please describe in full any meeting you had with Ms. Miers or any other White House employees on the above subject, including but not limited to the dates and locations of each such meeting, who was present, and what was said by whom.

On or about August 22, 2006, I met in the White House Counsel's office with then White House Counsel Harriet Miers and Deputy White House Counsel William Kelley. No other persons were present. The meeting occurred at my request to seek consideration for appointment as U.S. District Judge for the Western District of Washington. Prior to seeking the meeting, I was aware that the White House Counsel's office had heard or believed that I had "mishandled" the 2004 Governors election in Washington state by not seeking indictments for election fraud, voter fraud or other federal crimes (*see answer to question no. 2, below*). This meeting lasted approximately 45 minutes, and began with Mr. Kelley asking me why "Republicans in the state of Washington" were upset with me. I described the merit selection committee process in which I had participated in the preceding months, including my understanding that the three Republican committee members had blocked my application, in spite of having widely been considered the leading candidate for the position. I explained that I did not know the reasons for this, but that others were speculating that I was being punished for failing to intervene and assist the election of the unsuccessful Republican candidate. Both Mr. Kelley and Ms. Miers expressed consternation over this situation and they repeatedly indicated they could not understand why I was not among the three candidates recommended to the President for nomination. I took this opportunity to remind them of my qualifications and experience, including my service as United States Attorney, and that I hoped I could still be considered for nomination by the President. I believed that I was given a full and fair opportunity to make my case, and at the conclusion of the meeting, Ms. Miers escorted me to the door, thanking me for my years of service as the former President of the Legal Services Corporation.

2. Press reports have also quoted you as stating that someone in the White House referred to "criticism" that you "mishandled the 2004 election." Please state your understanding of who made that remark to whom and when and on what basis it was made.

Before seeking a meeting with the White House Counsel, I was advised that the Counsel's office was reporting within the White House that they were aware that I had allegedly "mishandled" the 2004 Governors election, and was therefore not one of the three recommended candidates for judge. In response, I submitted a detailed memorandum of activities undertaken by my office in connection with the 2004 Governors election and submitted it to the Counsel's office.

3. Please describe any conversations you had with officials at the Department of Justice relating to your termination as U.S. Attorney that occurred after the notification you received on December 7, 2006. This should include, but not be limited to, a conversation that the press has reported that you had with Michael Elston and your conclusion, as reported in the press, that Mr. Elston was suggesting a "deal" or "quid pro quo." Your description of each conversation should include, but not be limited to, who initiated each call, who participated, and what was said by whom. In addition, if you discussed any of these calls with any of the other former U.S. Attorneys who testified at the hearing, please describe any of these conversations.

On January 17, 2007 at 2:30pm while still serving as U.S. Attorney, I received a telephone call from Michael Elston, the Chief of Staff to Deputy Attorney General Paul McNulty. Mr. Elston proceeded to make a number of statements using a familiar tone which I did not appreciate in light of the circumstances, and related that "no one could believe that they had not seen any incendiary comments from John McKay". I did not respond. He then indicated that the Attorney General would be holding to general statements about U.S. Attorney resignations in his upcoming testimony before the Senate Judiciary Committee, and that they had been advised by "OPA" that they could say no more than this about the circumstances of our removals, including our forced resignations. I did not respond. He volunteered that it was "never our intention" to avoid Senate confirmation with our replacements. Although I did not believe him, I did not respond. He then asked if, "you have any more questions?" I then reminded him that he initiated the call, and that I had not asked him or any other Dept. of Justice official any questions and that his call seemed strange coming more than a month after my dismissal having received no other calls. I greatly resented what I felt Mr. Elston was trying to do: buy my silence by promising that the Attorney General would not demean me in his Senate testimony. I clearly and slowly told Mr. Elston that his description of what the Attorney General would be saying would have NOTHING to do with what I said or didn't say publicly. I told him that my silence thus far was because I believed it was my duty to resign quietly because I served at the pleasure of the President, and that I did not want to reflect poorly on him or the Department of Justice. I told him that nothing he could say in Washington D.C. could demean me in Seattle, and made clear that I did not appreciate his offer. My handwritten and dated notes of this call reflect that I believed Mr. Elston's tone was sinister and that he was prepared to threaten me further if he concluded I did not intend to continue to remain silent about my dismissal. Shortly thereafter, I believe within the hour, I spoke by telephone with Paul Charlton, U.S. Attorney for the District of Arizona and related the call and my conclusion that I was being threatened by Mr. Elston.

On January 26, 2007, my last day in office, I received a telephone call from Bill Mercer, the Acting Associate Attorney General and U.S. Attorney for the District of Montana. Mr. Mercer asked if he was supposed to call me "Professor" and indicated he wished to have coffee with me when he was next in Seattle. I told him he could reach me at Seattle

University School of Law and ended the call. I believe I may have had one call with Michael Battle, then the Director of the Executive Office for United States Attorneys in the Dept. of Justice. During January, 2007 I had sent several emails requesting the identity of my replacement so that I could prepare my staff, the judges in our district and our law enforcement partners. At approximately 3:30pm on January 26th, I received a phone call from John Nowacki with EOUSA advising me of the selection.

4. Some reports suggest that your alleged failure to pursue allegations of voter fraud contributed to your dismissal. Please state your response to such claims.

I do not have any knowledge of the true reason for my dismissal, and neither apparently did the Attorney General of the United States at the time my resignation was requested. A detailed "Close Out" memorandum was prepared by my office at the conclusion of this investigation, and it was submitted to the Criminal Division of the Dept. of Justice. It details actions taken by me and the Seattle Division of the F.B.I. and reports the unanimous conclusion that no evidence of federal crimes was found.

5. Please describe any awards, commendations, or other performance-related assessments that you received during your tenure as United States Attorney for the Western District of Washington.

While serving as United States Attorney, the office was evaluated twice by the EARS (inspection) staff for the Executive Office for United States Attorneys. The first evaluation occurred during 2002, during a reorganization of the Criminal Division and following the implementation of a Strategic Plan developed under my leadership. The office received generally positive reviews, as did I personally. The second evaluation would have normally occurred in calendar year 2005; however I received a phone call at that time from Michael Battle, Director of EOUSA informing me that it would be delayed until 2006 because, "we know your District is so well run". In March, 2006 approximately 27 inspectors interviewed over 170 individuals and gave the office overwhelmingly positive reviews, making few significant suggestions for improvement and declaring my leadership of the Law Enforcement Information Exchange ("LInX") to be among the *Department of Justice Best Practices*. In addition to finding my leadership to be exemplary, the report which was finalized on September 22, 2006, found the office to be in compliance with all Dept. of Justice investigative and prosecutive policies.

I have received a number of awards and honors while serving as U.S. Attorney which undoubtedly were in part due to the efforts of the hard working women and men of my office. AUSA's, support and administrative staff, together with our federal law enforcement partners deserve the credit. The only noteworthy award is the Department of the Navy's *Distinguished Public Service Award*, its highest civilian honor, which was presented to me in January, 2007 for my leadership of LInX. Following is the

commendation accompanying the award, which was signed by Gordon England, currently the Deputy Secretary of Defense:

For exceptional public service to the Department of the Navy from October 2001 to December 2005, while serving as United States Attorney for the Western District of Washington. As the senior law enforcement officer for the Federal Government, Mr. McKay worked closely with the Naval Criminal Investigative Service and the Navy Master at Arms forces to ensure the safety and security of those working and living in the Western District by instituting innovative, cutting edge programs. Mr. McKay developed a collaborative strategic planning process with members of the federal law enforcement community to develop a common federal law enforcement approach to identifying the major criminal threats impacting his District. The result was greater information sharing among 23 law enforcement partners and the creation of the Washington Joint Analytical Center, providing real time analytical support to all law enforcement agencies in the State concerning terrorism and major criminal offenses. Mr. McKay provided critical leadership in the development and implementation of the Northwest Law Enforcement Information Exchange (LInX Northwest). The LInX Northwest, currently comprised of 53 federal, state, and local law enforcement agencies through the State of Washington, is an electronic database for the rapid exchange of criminal justice and investigative information among its members. This database has ensured immediate access to information that has deterred, disrupted and mitigated criminal and terrorist related activities in the Western District of Washington. The acting Deputy Attorney General of the United States recognized Mr. McKay for his efforts in information sharing by appointing him to lead the integration of LInX throughout the Department of Justice law enforcement agencies. Mr. McKay's initiative, perseverance, and noteworthy achievements reflect great credit upon himself and the United States Department of Justice, and are in keeping with the highest traditions of public service.

6. Did you ever receive a warning from the Justice Department that your office's priorities would result in you being asked to resign?

At no time did any official of the Department of Justice, either as part of a formal review or at any other time, advise me the I or my office was failing to execute the priorities of the Department or the President. At no time was I advised I might be asked to resign until December 7, 2006.

7. When you were notified by Executive Office for United States Attorneys Director Michael Battle that you were being asked to resign, did he give you any explanation why this was being done?

No explanation for my requested resignation was given. I asked Mike Battle if he could tell me anything, and he responded in the negative. When I asked him if others were receiving similar calls he stated, "John, I do not have any information on that". After a pause, and not

in response to any question of mine, Mr. Battle stated, "I know it must feel like when getting a call like this that you've done something wrong. That's not always the case". I said, "o.k." and he ended the call.

8. Please describe any conversations you had with officials at the Department of Justice relating to your termination as U.S. Attorney that occurred after the notification you received on December 7, 2006. Your description of each conversation should include, but is not limited to, who initiated each call, who participated, and what was said by whom. In addition, if you discussed any of these calls with any of the other former U.S. Attorneys who testified at the hearing, please describe any of these conversations.

See answer to Question No. 3.

9. What effect, if any, did the Administration's annual budget cuts have on your office?

While serving as U.S. Attorney, the office along with all other offices in the field had frozen or reduced budgets in my last three fiscal years. As I do not have access to office records at this time, I can not detail the dollars or positions that were lost. At the time I left office, I believe our Criminal Division was down over 10 percent in AUSAs and support staff, seriously impacting federal law enforcement in the District.

10. Did these budget cuts have a disproportionate effect on your office? If so, please explain why.

I do not believe the budget situation in my office was disproportionate to other offices. At the time we learned of the first cuts, my management team concluded that the only way to meet budget was to freeze hiring, and we projected a 10-15 percent reduction in prosecutors. I contacted 5-10 U.S. Attorneys, including Carol Lam in San Diego, James McDevitt in Spokane, Kevin Ryan in San Francisco, Karin Immergut in Portland and Debra Wong Yang in Los Angeles. All reported similar experience.

11. What effect did these budget cuts and lack of personnel have on the ability of your office to meet the Justice Department's myriad priorities?

Obviously, a reduction in resources of this magnitude impacts many prosecutive priorities within an office. Our management team responded by seeking to (1) reduce costs wherever possible; (2) increase workloads; (3) communicate honestly with law enforcement partners about our situation. Guidance concerning prosecutive priorities comes from the Dept. of Justice Strategic Plan and the goals and priorities listed there, the additional priorities stated by the Attorney General and Deputy Attorney General and by me as U.S. Attorney. I do not believe that we failed to meet all of these priorities due to the hard work of the men and women of federal law enforcement in my former District.

12. Did your office request additional resources from the Attorney General? If yes, were your requests granted or denied? If denied, were you told why?

On numerous occasions during my tenure as U.S. Attorney, I was given the opportunity to request additional AUSA and support staff positions. Although I do not have access to the office records, I did receive new AUSA positions for drug prosecutions, counter terrorism, cyber crime and gun prosecutions. However, at the time of my resignation, nearly all of these new FTE's were effectively unfilled due to the budget freeze and reductions. I did submit, in conjunction with the development of our Strategic Plan, a request for approximately 20 additional AUSA's to meet the priorities set forth in the Dept. of Justice and District Strategic Plan. I received no response from the Department. In the final three fiscal years, I requested that EOUSA adjust the litigation support line for the District which was, in my judgment, grossly inadequate. During my tenure, the number of indictments and defendants nearly tripled in number over prior years, and the budget developed in Main Justice did not reflect this. Then Director Mary Beth Buchanan promised to adjust this number (which in effect was penalizing the office for being more productive), and this never occurred. This shortfall prevented the office from hiring a number of AUSA and support staff that we were otherwise authorized to hire, and adversely impacted our ability to perform.

13. Did your office experience any hiring freezes during your tenure?

Although the Department never acknowledged a "hiring freeze" of AUSAs, every office in the country dealt with the budget freezes and reductions by delaying or failing to fill FTE positions.

14. How many Assistant United States Attorneys did your office have when you started and completed your tenure as United States Attorney?

As of the beginning of my term, the office had approximately 60 AUSAs. At my departure, there were approximately 65 ASUA positions, with seven unfilled due to budget constraints.

JOHN MCKAY'S RESPONSES TO "Questions for John McKay, Esq." which accompanied the Questions from Subcommittee Chair Sanchez

1. *When you were a U.S. Attorney, did you understand that you served at the will of the President?*

Yes.

2. *Did you serve out the full, four-year term of your appointment?*

I served from October 30, 2001 to January 26, 2007.

3. *Do you understand the Department of Justice has to set enforcement policies for the nation?*

No. The Department of Justice sets enforcement policies for the Department. The Congress, the President and arguably other Departments and agencies also establish policies.

4. *Sentencing Commission statistics suggest that less than 37 percent of your cases were in the range suggested by the Sentencing Guidelines and that non-governmental downward departures from the Guidelines were more than 30 percent. Were you not aware as U.S. Attorney that the Department of Justice national policy is actively to seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases?*

Yes I am aware of and established policies within my office which strongly promoted sentencing recommendations to U.S. District Judges consistent with the Sentencing Guidelines, Ninth Circuit and U.S. Supreme Court decisions.

5. *Were you not aware as U.S. Attorney that Department of Justice national policy is to preserve the ability of the United States to appeal unreasonable sentences?*

Yes I was aware of this.

6. *What percentage of downward departures in your district did you recommend for appeal?*

I do not have access to this information; however you should be able to obtain it from the Department of Justice.

7. *Do you know the Department of Justice policy as stated in the U.S. Attorneys Manual with regard to contacts with Congress?*

Yes.

8. *Did you follow that policy in all respects when you received the alleged contacts from Congressional staff which you discussed at the hearing?*

Yes.

9. *Do you believe that your failure to follow all aspects of that policy reflected the best judgment that can be expected of a U.S. Attorney?*

Not applicable.

